

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. A-267

76-660

HUMANE SOCIETY OF THE UNITED STATES,
NEW JERSEY BRANCH, INC., et al.,
Appellants,

vs.

NEW JERSEY FISH AND GAME COUNCIL, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

**RESPONSE TO APPELLANTS'
JURISDICTIONAL STATEMENT**

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

RESPONSE TO
JURISDICTIONAL STATEMENT

Appellants appeal from a final judgment of the Supreme Court of New Jersey entered on July 15, 1976 which sustained the constitutional validity of N.J.S.A. 13:1B-24. This Response to Appellant's Jurisdictional Statement is submitted to demonstrate that the Supreme Court of the United States should not exercise jurisdiction over this appeal in that a substantial question is not presented or, in any event, the judgment of the Supreme Court of the State of New Jersey is correct.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Jersey are reported at 70 N.J. 565 and — A.2d —. The opinion of the trial court which found the statute unconstitutional is reported in 129 N.J. Super. 239, 322 A.2d 841 (Ch. Div. 1974). These opinions are attached as Appendix A to the Jurisdictional Statement submitted by Appellants.

JURISDICTION

This suit was brought in State Court under the Fourteenth Amendment to the United States Constitution in order to have N.J.S.A. 13:1B-24 declared unconstitutional and have its enforcement enjoined. The judgment of the Supreme Court of New Jersey was filed on July 15, 1976 and a Notice of Appeal was filed in that court on September 29, 1976. The Appellants assert that the jurisdiction of the United States Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. §1257(2). The text of the statute involved is set forth as Appendix B to the Jurisdictional Statement submitted by Appellants.

QUESTIONS PRESENTED

1) Is a New Jersey statute requiring that the membership of the New Jersey Fish and Game Council be composed of six sportsmen nominated by a federation comprised almost exclusively of hunters and sportsmen, three farmers nominated by an agricultural organization, and two commercial fishermen, so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment?

2) Does the participation of the New Jersey Federation of Sportsmen's Clubs and of an Agricultural Convention in recommending to the Governor persons for membership on the Fish and Game Council constitute a violation of due process of law?

STATEMENT OF THE CASE

The New Jersey Fish and Game Council is an eleven-member governmental body within the Division of Fish, Game and Shell Fisheries in the Department of Environmental Protection. N.J.S.A. 13:1D-1; N.J.S.A. 13:1D-4. It has certain statutory powers over the protection, propagation, and use of New Jersey's fish, birds and other game animals. Pursuant to N.J.S.A. 13:1B-28, the Council is charged with developing, subject to the approval of the Commissioner of the Department of Environmental Protection, a comprehensive State policy with respect to the protection and propagation of wildlife. The Council also has regulatory control over the manner in which hunting or fresh water fishing is permitted in the State. N.J.S.A. 13:1B-30, *et seq.* To this end, the Council is empowered to establish a State Fish and Game Code regulation "... under what circumstances, when and in what localities, by what means and in what amounts and numbers such fresh water fish, game birds, game animals, and fur-bearing animals, or any of them, may be pursued, taken, killed, or had in possession. . . ." N.J.S.A. 13:1B-30.

The procedure for recommendations and appointments to the New Jersey State Fish and Game Council are set forth in N.J.S.A. 13:1B-24:

There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of and interest in the conservation of fish and game. Each member of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the Agricultural Convention held pursuant to the provisions of article two

of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen***.

The Council has 11 members, all appointed by the Governor with the advice and consent of the Senate. Of the eleven, three are "farmers," chosen by the Governor from recommendations submitted by the state Agricultural Convention. N.J.S.A. 4:1-4. Six members are "sportsmen," chosen by the Governor from recommendations submitted by the New Jersey State Federation of Sportsmen's Clubs. The two remaining members are "commercial fishermen." Each member is to be chosen "with due regard to his knowledge of and interest in the conservation of fish and game." N.J.S.A. 13:1B-24.

There is no statutory requirement that those recommended for appointment to the Fish and Game Council by the Governor be members of any of the recommending organizations.

Appellants initiated this suit in February 1973 challenging, on equal protection and due process grounds, the constitutionality of the subject statute. The trial court (which heard the case on what it called "a limited stipulation of facts and legal argument"), held the statute unconstitutional, 129 N.J.S. 239 (Ch. Div. 1974).

Plaintiffs are two non-profit organizations, the Humane Society of the United States, New Jersey Branch, and the Sierra Club, and two individuals who are tax payers and citizens of the State of New Jersey. They contend that the Fish and Game Council membership statute is constitutionally defective because it enumerates three classes of appointees to the Council—sportsmen, farmers, and com-

mercial fishermen—and excludes from appointment any person who is not recommended to the Governor by either the State Agricultural Convention or the New Jersey State Federation of Sportsmen's Clubs (hereafter Sportsmen's Federation). In essence, plaintiffs characterize their exclusion from the ranks of those eligible for appointment to the Council as a denial of equal protection. In addition, they contend that the statutory delegation of the power of appointment to a private organization such as the Sportsmen's Federation would violate due process. The trial court's opinion upheld plaintiffs position and ruled that a person otherwise qualified may not statutorily be excluded from appointment to the Fish and Game Council on the ground that he or she is not either a sportsman, farmer, or a commercial fisherman.

On July 15, 1976, the New Jersey Supreme Court reversed in a 6 to 1 decision which sustained the validity of the statute. The Court held that the statute satisfies the requirements of the equal protection clause since the grant of access to Council membership was rational given the specialized and limited nature of Council activities. The role of private organizations in the nominating process was similarly sustained against appellants due process argument.

The Division of Fish, Game and Shell Fisheries and the Fish and Game Council are dependent upon revenues from hunting and fishing licenses to finance their activities.

ARGUMENT

Appellants seek review of the decision of the Supreme Court of New Jersey by this Court pursuant to 28 U.S.C. §1257(2) and assert that the questions presented are of substantial public importance. Insofar as the significance of the questions presented is concerned, the Supreme Court of the State of New Jersey concluded as follows with respect to the powers and activities of the New Jersey Fish and Game Council:

"The Fish and Game Council is invested with certain regulatory powers aimed at protecting and developing an adequate supply of fish and game for recreational and commercial purposes. These powers are expressed primarily by the Council's determination as to when and where in the State hunting and fishing shall take place and which fresh water fish, game birds, game animals, and fur-bearing animals may be taken and in what numbers. The wildlife thus regulated are those animals which are the focus of the sports of hunting and fishing."

The Court also noted that the Fish and Game Council supervises a program of wildlife propagation, the expenses of which are supported by fees from hunting and fishing licenses paid for by sportsmen and commercial fishermen. Parenthetically, the Court concluded that the regulation of endangered species does not fall within the scope of the Council's powers and duties. Thus, given the rather limited and specialized nature of the duties and responsibilities of the New Jersey Fish and Game Council, it is respectfully submitted that no substantial question is presented on this appeal.

Under any circumstances, it is further submitted that the conclusion of the New Jersey Supreme Court was cor-

rect in all respects. Obviously, all legislative classifications do not fall as being violative of constitutional standards. As the New Jersey Supreme Court noted below:

"Equal protection does not require that all persons be dealt with identically. If there is some reasonable basis for the recognition of separate classes, and the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the constitution is not offended. [*New Jersey Chapter, American Institute of Planners, v. New Jersey State Board of Professional Planners*, 48 N.J. 581, 601, appeal dismissed, 389 U.S. 8, 88 S. Ct. 70, 19 L.Ed.2d 8 (1967)]

The New Jersey Supreme Court concluded that the trial court correctly applied to the Council membership statute the minimum scrutiny, rational basis test, which looks to whether a state of facts exists that could reasonably justify the legislative scheme, citing *Salier Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L.Ed.2d 659 (1973). In that case, this Court rejected an equal protection challenge directed against provisions in the Water Code of the State of California which established voter qualifications for electing the directors of water storage districts in the state. Only landowners were eligible to vote and the votes were apportioned according to the assessed valuation of the land. That qualification was found acceptable despite the fact that it impinged on the franchise, because landowners as a class bore the entire burden of the costs of the water district and the state "could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for (the district's) operation" 410 U.S. 731, 93 S.Ct. 1231, 35 L.Ed.2d 65.

The New Jersey Supreme Court went on to state as follows:

"Here, as in *Slayer*, a particularized unit of government is implicated and the persons who achieve office do not have plenary powers. The Fish and Game Council is a specialized body, with statutorily prescribed duties and statutory limits on its powers and activities. Its members serve by appointment, not by election. Access to the Council cannot be said to be entwined with the fundamental right to vote, which would call for this Court to use the stricter, close scrutiny standard of review and would rebut the presumption of validity the statute now enjoys. *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

The burden, then, is on plaintiffs to demonstrate that the impact upon them of the Fish and Game Council's decisions is so significant and substantial as to render a statutory scheme which effectively bars from them appointment to the Council patently arbitrary and unreasonable. Only upon such a showing can their non-membership in this specialized body assume the dimensions of a constitutional deprivation.

It is clear, as recognized by the New Jersey Supreme Court, that the qualifications set forth in the challenged statute are reasonably related to the work of the Fish and Game Council. Farmers can be expected to bring to the Council knowledge of how agricultural uses of land can best be harmonized with the maximum propagation of wildlife. Sportsmen certainly have the keenest of interests in insuring an abundant supply of wildlife for all sporting activities as well as the development of nondepleting and safe hunting and fishing practices. Commercial fishermen owe their very livelihood to the continued plentiful supply of good fish, and to that end can be expected to be knowledgeable regarding the need to conserve fish life and to act wisely in fostering the propagation and ecologically

sound harvesting of such fish to the benefit of all New Jersey citizens.

Thus, that the Legislature has consciously decided that the expertise of such individuals is necessary to the proper management of wildlife in this State is a perfectly rational decision. Whether, as plaintiffs contend, there are other non-farming, hunting or fishing groups that could aid in the proper management of wildlife is beside the point, as the question before this Court is the constitutional right of the Legislature to select the groups in question and not to second guess the wisdom of that choice.

That the plaintiffs might prefer a different substantive policy, or a less stringent set of qualifications, does not render the existing statute unconstitutional. Legislative classifications need only be reasonable, not utopian:

In recognizing that the subject statute specifies that six of eleven Council members must be sportsmen, the New Jersey Supreme Court stated:

"Assuming this category consists of hunters and fishermen of the state, it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure safety in hunting, and in overseeing the operations of the state's hatching and game farm and its stocking activity."

Notwithstanding Appellant's assertion as to the alleged broad powers of the Fish and Game Council, the Supreme Court of the State of New Jersey correctly concluded that "the dominion of the Fish and Game Council is * * * confined," setting forth in its opinion such limitations (Appendix 14a) and further that "the Council does not have unfettered authority to decide that hunting or fishing will take place on private property, see *N.J.S.A.*

23:7-1), or on state owned lands. The Supreme Court of New Jersey went on to state; "the consignment of the specialized powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis, because these entities are most directly affected by the Council's regulations and possess the requisite expertise for achievement of the statutory objective." In passing, the Supreme Court of New Jersey also noted that professional boards established by state statutes "almost uniformly have a majority membership made up of representatives of the regulated profession," noting specifically boards regulating doctors and nurses and stating further that when "measured against this legislative scheme, which entrusts the interested parties rather than the general public the management of particular professions, the Fish and Game Council's membership statute is neither untoward or surprising."

Furthermore, it is respectfully submitted that the Supreme Court of New Jersey was correct in concluding that the challenged statute should be sustained not only under the rational basis test, but even under the more stringent "means focused" test which it had otherwise used to "determine constitutional challenges asserting interests more fundamental than the ones advanced by these plaintiffs." (Citing *Boro of Collingswood v. Ringgold*, 66 N.J. 350 (1975), *appeal dismissed* — U.S. —, 96 S.Ct. 2220, 48 L.Ed.2d 826 (1976). In concluding its rejection of the Equal Protection argument advanced by Appellants, the New Jersey Supreme Court aptly stated:

"The governmental interest in establishing regulations to ensure a plentiful supply of game animals for consumption and sport is suitably furthered by placing a degree of regulatory control in the hands of a Fish and Game Council composed of sportsmen, farmers, and commercial fisherman. Opening the Council's membership to persons with differing philosophies

might reflect the art of public relations, but it is not a constitutional necessity."

Plaintiffs further contend that the role played by the Agricultural Convention and by the Sportsmen's Federation in recommending to the Governor nine of the eleven appointees to the Council is offensive to due process of law because it produces a body incompletely representative of the public interest.

The New Jersey Supreme Court rejected this argument citing *Driscoll v. Sakin*, 121 N.J.L. 225 (Sup. Ct. 1938) *aff'd*, 122 N.J.L. 414 (E. & A. 1939), asserting that the delegation of nominating authority to private persons is not in derogation of the constitution where that document is silent as to the appointment of public officials. Interestingly enough, the Court noted an appointive scheme relating to a statutory body known as the New Jersey Natural Lands Trust, N.J.S.A. 12:IV-15.119 *et seq.*, which is similar to the appointment method plaintiffs challenge in this case. The Natural Lands Trust, which has trusteeship powers relating to natural areas preservation is composed of eleven members, six of whom are appointed by the Governor "from a list of candidates nominated by a nominating committee provided by a group of non-profit New Jersey Corporations having open space preservation or environmental education as their corporate purpose,***." N.J.S.A. 12:1B-15:120. The Supreme Court concluded that plaintiffs in the instant case, particularly the Sierra Club, have interests analogous if not identical to the corporate purposes defined in that statute. And yet, obviously, the Sierra Club has not complained about that statutory scheme.

As the New Jersey Supreme Court noted, even delegation of legislative authority to private parties may withstand constitutional challenges if sufficient safeguards exist to prevent arbitrary concentration of power in per-

sons or groups motivated by self-interest. Citing *Male v. Renda Contracting*, 64 N.J. 199, cert. den. 419 U.S. 839, 95 S. Ct. 69 42 L.Ed.2d 66 (1974) the Court stated that "the test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the Statute." In the *Male* case, a statute which fixed the wage rate for public works was geared to wages for particular crafts or trades fixed by collective bargaining agreements in the locality. While it was alleged in that case that the delegation to groups who negotiated these agreements created a danger of self motivated action, no actual harm to the public good was shown. Not only has no harm to the public been shown in regard to the statutory scheme under consideration here, but as the New Jersey Supreme Court stated, here no such harm has ever been alleged.

It is submitted that the conclusion of the New Jersey Supreme Court on the question of due process is correct and should stand:

"Our review of the limitations on the Fish and Game Council's authority, which limitations serve to promote other interests, convinces us that there does not reside in that body the potential for such aggrandizement of the Council members' interests as would be repugnant to due process."

Respectfully submitted,

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On the Statement